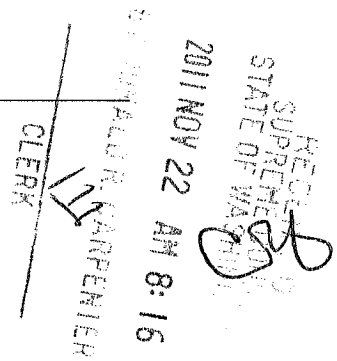
No. 85091-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Personal Restraint of:

RICHARD J. DYER,

Petitioner.



PETITIONER'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The purpose of this brief is to flesh out some of the legal claims in Dyer's pro se personal restraint petition (PRP). It does not replace the more comprehensive discussion in the PRP and Reply.

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIMES

Dyer is not challenging his underlying convictions in this PRP. However, because the ISRB relied heavily on the supposed facts of the crime (including counts that were overturned on appeal) and his "denial" of guilt, he has corrected the ISRB's account. *See* PRP at 7-18, 25-27.[1]

Both counts of conviction turned on the victims' eyewitness identification testimony, with no confirming DNA, blood-typing, or fingerprint analysis.

> The first victim testified the rapist was five feet, two or three inches tall, no mustache, lived on a gravel, road, and drove a Mercury Comet.[2] Dyer, however, is five feet, seven inches tall, wore a mustache, lived in a house with an asphalt paved drive, and drove a Mercury Meteor. The second victim originally told police she would be unable to

[1] Dyer does this mostly through the interlineation of footnotes to his quotation of the ISRB's most recent Decision and Reasons. Dyer cites extensively to excerpts of the verbatim report of proceedings from his criminal trial, which are attached to the PRP between Exhibits T and U as Appendix 1-3.

[2] She knew the car was a Comet because she saw that word spelled out on the back of the car. *See* PRP at 11 n.12.

> identify her rapist, but at trial 16 months later she identified Dyer after seeing him led into the courtroom in handcuffs between two policemen.

In re Pers. Restraint of Dyer, 164 Wn.2d 274, 299, 189 P.3d 759 (2008) (Dyer II). Dyer did not become a suspect in these stranger rapes until – a year after they occurred – his ex-wife accused him of rape.

> There is also substantial evidence undermining the veracity of Dyer's second wife and her allegations. For example, in dissolution proceedings her claims that he had not paid child support since the divorce were directly contradicted by receipts, court pleadings, and her own subsequent testimony. A number of factual inconsistencies existed in her testimony as well regarding the alleged rape itself, which she failed to report for a year, and then only after he announced his intention to wed Rennetta [Dyer].

Pers. Restraint of Dyer, 143 Wn.2d 384, 409, 20 P.3d 907 (2001) (dissent).[3]

At trial, doctors testified that they found sperm in vaginal samples from Ms. A and Ms. B. RP 239; 245-46. The sperm was not tested to see whether it could have come from Dyer. In 2001, in view of Substitute

[3] In his PRP, Dyer refers to this case, which concerned trailer visits, as "Dyer I." To maintain consistency with this Court's abbreviations in its most recent decision, Dyer will refer to the two decisions regarding parole as "Dyer I" (*In re Pers. Restraint of Dyer*, 157 Wn.2d 358, 139 P.3d 320 (2006)) and "Dyer II" (*In re Pers. Restraint of Dyer*, 164 Wn.2d 274, 189 P.3d 759 (2008)).

Senate Bill 5896, Dyer requested DNA testing. Unfortunately, any biological evidence had been destroyed by that time.[4]

B. ISRB AND SUPREME COURT PROCEEDINGS

On September 15, 1986, the ISRB set Mr. Dyer's minimum term at 240 months. It recognized that the SRA standard range was only 63-88 months. PRP, Ex. H. In 1995 and 1998, the ISRB considered Mr. Dyer for parole under RCW 9.95.100. Both times he was found not parolable and his minimum term was extended by 60 months. PRP, Ex. J and K.

On September 26, 2001, DOC psychologist Carson E. Carter prepared a report at the ISRB's request. PRP, Ex. V. He noted that "Mr. Dyer had a distinguished career in the army, spending 9 years in that service until he was honorably discharged in 1976." *Id.* at 2. During his two tours of duty in Vietnam he received numerous medals and awards. *Id.* He then began a successful career as a supervisor at the Puget Sound Naval Shipyard. In prison, Mr. Dyer "has programmed extensively in a highly successful manner." *Id.* "Mr. Dyer suffers from no serious mental illness, but he does suffer the lingering effects of PTSD, much like many

[4] The Sheriff's Office had destroyed all evidence in its possession, and the clerk's office did not maintain the vaginal swabs, or any clothing of the victims, as exhibits. *See* PRP, Ex. Q, Ex. 15-17 of Prisoner's Memorandum Re: .100 Hearing. Dyer has attached as Exhibit Q to his PRP undersigned counsel's entire prehearing memo with its exhibits.

war veterans." *Id.* In the clinical interview, Mr. Dyer "did not appear to be overly controlled nor did he appear glib or deceptive; he was articulate in a simple, modest manner." *Id.* at 3.

Carson Carter administered several psychological tests. "On both the Minnesota Sex Offender Screening Tool-Revised (MSOST) and the Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR) Mr. Dyer received low scores. **His scores are typical of sex offenders who present a low risk to reoffend.**" *Id.* at 3 (bold type in original).

> On the Hare Psychopathy Checklist-Revised (PCL-R) Mr. Dyer received a **very low score** indicating a **low risk** of committing another violent offense within six months after his release from custody. His score was 5, which is the lowest score this psychologist has ever interpreted on this test.

Id. at 4 (bold type in original).

> Mr. Dyer has a legitimate home address, realistic plans for the future, and employable skills; he is prepared to take his place in society as a productive citizen. If we are gauging risk, he has met the criterion for a less restrictive environment. According to the file data, interview and tests, this person could be considered for community supervision with less concern for the community than many of the offenders who are released into society.

Id.

This document will be referred to as ".100 Memo" with appropriate citations to its exhibits.

On December 4, 2001, Mr. Dyer attended a .100 hearing. His counselor confirmed Dyer's "exemplary" attitude and behavior in prison, and his family support. He was aware that Dyer runs a business outside the prison with the help of attorneys. Dyer had completed all the available offender change programs available at McNeil Island, and had never refused any counseling offered to him. PRP, Ex. O at 5-7.

On January 30, 2002, the ISRB found Dyer not parolable and added 60 months to his minimum term. PRP, Ex. L at 1. The ISRB conceded that "Mr. Dyer's psychological reports consistently indicate low to medium risk," and "[h]is behavior in the institution is quite good." *Id.* at 2. The "central difficulty" was that "Mr. Dyer remains an untreated sex offender." *Id.* at 3. The ISRB characterized this as a "Catch-22" because "[c]ompletion of a sex offender treatment course generally requires what is called full candor by the treating authorities, and Mr. Dyer continues to maintain his innocence." *Id.*

Dyer filed a personal restraint petition challenging the ISRB's decision. In *Dyer I*, 157 Wn.2d 358, the Court found that the ISRB abused its discretion in denying parole in 2002. The Court noted that the ISRB has set out factors that can support a finding of nonparolability. *Id.* at 364, quoting WAC 381-60-160. "Although this list of reasons that may support

an ISRB finding of nonparolability is not exhaustive, the list should guide the ISRB's decisions." *Id.* "In the present case, the record from the hearing does not support any of these factors." *Id.* Although the Court did not directly order the ISRB to release Dyer, it concluded that "a review of the evidence and testimony presented at the parolability hearing suggests Dyer met his burden to have conditions of release on parole established." *Id.* at 369.

In preparation for the next parole hearing, DOC psychologist Dr. David Monson prepared a new evaluation for the ISRB in 2005. PRP, Ex. W. He noted that Dyer "served nine years in the Army, including two tours in Vietnam, and was repeatedly decorated for gallantry and heroism." *Id.* at 2. The report details Dyer's extensive programming, and that he has had no infractions since 1995. *Id.* at 2. Mr. Dyer "maintains close contact with his wife and children . . . and has achieved the extraordinary feat of supporting his family financially throughout his incarceration through his outside business." *Id.* at 3. The various psychological tests indicated a low risk of reoffense. *Id.* at 3-5. For example, Dr. Monson scored Dyer as a "3" on the PCL-R, an even lower score than Mr. Carter gave him. Dr. Monson concluded as follows:

> For the past sixteen years Mr. Dyer has been a model inmate, with only one infraction nine years ago,

> maintaining a stellar work history, programming through all the classes available to him and, extraordinarily, financially supporting his family. He has good community support and a good intact plan. In addition, the psychological testing indicates a low risk to reoffend. Mr. Dyer appears to be an appropriate risk for community placement.

Id. at 5.

On December 5, 2006, the ISRB issued its decision denying parole and extending Dyer's minimum term by 80 months. PRP, Ex. M. The central reason was identical to the one proffered the last time: Dyer is an untreated sex offender and is therefore unsafe to be released.

> The difficulty the Board has with Mr. Dyer's continual denial is that it makes him not amenable to treatment. . . . Amenability to and application of treatment are entirely up to the offender. The result of such treatment, one hopes, is that the offender will not reoffend.

Id. at 12.

In *Dyer* II, 164 Wn.2d 274, a shifting majority voted 5-4 to affirm the ISRB. The majority found that the ISRB was within its discretion to deny parole because Dyer was an untreated sex offender. *Id.* at 288. The dissent found it disturbing that Dyer's profession of innocence prevented his release, when the State had destroyed the biological evidence that could permit Dyer to prove his innocence. *Id.* at 299-300.[5]

[5] After reviewing Dyer II, the Innocence Project Northwest contacted undersigned counsel and begin their own investigation. Unfortunately, they had no more luck than I did in obtaining evidence that could be tested.

The ISRB's most recent decision is set out in full at pages 7-20 of the PRP. *See also* PRP, Ex. N.

III. ARGUMENT

A. THE ISRB ABUSED ITS DISCRETION IN DENYING PAROLE

1. Legal Standards

> The ISRB abuses its discretion when it fails to follow its own procedural rules for parolability hearings or acts without consideration of and in disregard of the facts. Reliance upon speculation and conjecture with disregard of the evidence also constitutes an abuse of discretion.

Dyer II, 164 Wn.2d at 286 (internal quotation marks and citations omitted). The ISRB's decision must be based on "objective facts." *Id.* at 287.

The Court may wish to clarify what it means for the ISRB to act "without consideration of and in disregard of the facts." This should mean not only that the ISRB must consider correct facts, but that the facts found by the ISRB actually support its decision. The California courts have reached the same conclusion even though their standard of review is arguably less stringent than Washington's. California requires only that a parole decision be supported by "some evidence." *In re Rosenkrantz*, 29

Cal.4th 616, 658, 128 Cal.Rptr.2d 104, 59 P.3d 174 (2002), *cert. denied*, 538 U.S. 980, 123 S.Ct. 1808, 155 L.Ed.2d 669 (2003). Nevertheless,

> when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings.

In re Lawrence, 44 Cal.4th 1181, 1212, 190 P.3d 535, 82 Cal.Rptr.3d 169 (2008) (citations omitted; emphasis in original). *See also In re Shaputis*, 44 Cal.4th 1241, 1254, 190 P.3d 573, 82 Cal.Rptr.3d 213 (2008).

> If simply pointing to the existence of an unsuitability factor and then acknowledging the existence of suitability factors were sufficient to establish that a parole decision was not arbitrary, and that it was supported by "some evidence," a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have no bearing on the paramount statutory inquiry. Such a standard . . . would leave potentially arbitrary decisions of the Board or the Governor intact.

Lawrence, 44 Cal.4th at 1211 (citations omitted).

This reasoning is pertinent to Dyer's case. The ISRB's consistent reason for denying parole is that Dyer is an untreated sex offender. It is, of course, true that Dyer has been convicted of sex offenses and that he has not participated in the SOTP (because it will not accept him). But there is simply no evidence that those facts render him unrehabilitated or unsafe to

be released. Further, the four dissenting justices in *Dyer II* found it unreasonable for the ISRB to condition release on completion of the SOTP when objective studies have shown that prisoners who, like Dyer, are willing but unable to enter the program actually have a *lower* risk of recidivism than those who complete the program. *Id.* at 301-02.[6]

Further, three of the last four psychologists to evaluate Dyer have found him to present a very low risk of reoffense despite his denial of guilt and lack of sex offender treatment. Two of those psychologists were employed by the Department of Corrections. (As discussed below, the fourth evaluation, by Dr. Pereira, should not be considered.).

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[6] The majority mistakenly stated that a second policy paper "showed that offenders who willingly participate in the program have lower recidivism rates than those who are unwillingly participate in the program." In fact, there is no such thing as unwilling participation in the SOTP. The majority apparently misread a paper entitled: "Sex Offender Sentencing in Washington Sate: Who Participates in the Prison Treatment Program?" .100 Memo, Ex. 28. In it, WSIPP makes a clear distinction between willingness to participate in the SOTP and ability to be accepted into the SOTP. The paper sets out a flow chart entitled "SOTP participation process." *Id.* at 2. The first step is to determine the offender's willingness to participate. DOC then records whether the offender has applied for the program. Next, "SOTP may reject applicants because they are appealing a conviction or deny the offense" (emphasis altered). Thus, the WSIPP study accounts for prisoners like Dyer who assert their willingness to participate but are denied entry because they do not admit guilt. It is only the "not willing" group that has a higher degree of recidivism. *Id.* at 6.

To study the effectiveness of the SOTP, "[t]he comparison group will be derived from those with similar custody levels who were recorded as willing to participate in SOTP but never entered the program." *Id.* A separate paper, discussed above, then sets out the results of that comparison. .100 Memo, Ex. 28. According to actuarial measures, the SOTP group should have a lower risk to reoffend even if the treatment itself had no effect. *Id.* at 2. In fact, however, the SOTP group had a somewhat higher rate of committing new sexual offenses. *Id.* at 4.

This Court has previously held that denial of guilt – in itself – cannot be a basis for denying release; there must be some connection between the denial of guilt and the prisoner's "threat to community safety." *In re Ecklund*, 139 Wn.2d 166, 176, 985 P.2d 342 (1999).

In his PRP, Dyer cites *Cooke v. Solis*, 606 F.3d 1206 (9th Cir. 2010), for the proposition that the federal due process clause requires parole decisions to be supported by "some evidence." That decision was recently overturned by the U.S. Supreme Court in *Swarthout v. Cooke*, -- U.S. -- , 131 S.Ct. 859, 178 L.Ed.2d 732 (2011), which essentially precludes substantive review of state parole decisions through federal habeas. *Swarthout*, of course, leaves state courts free to review their own parole decisions as they see fit.[7] In that regard, this Court may consider as persuasive authority the many Ninth Circuit cases holding that the "evidence underlying the board's decision must have some indicia of reliability." *See, e.g., McQuillion v. Duncan*, 306 F.3d 895, 904 (9th Cir. 2002) (internal quotation marks and citation omitted).

2. Dr. Pereira's Report is not "Objective Evidence"

[7] *See Swarthout*, 131 S.Ct. at 863 ("the responsibility for assuring that the constitutionally adequate procedures governing [state]'s parole system are properly applied rests with [state] courts[.]").

As noted above, the DOC psychologists who evaluated Dyer before his 2005 and 2008 hearings found him to be a very low risk to reoffend, based on both subjective assessments and actuarial risk tools. Recently, a new DOC psychologist, Dr. Patricia Pereira, met with Dyer and came up with radically different conclusions. For example, Mr. Carter and Dr. Monson gave Dyer extremely low scores of 5 and 3, respectively, on the PCL-R, which measures risk by assessing pathology. Dr. Pereira somehow came up with a score of 27. She also gave Dyer a score of 6 on the Static-99 assessment tool (which was not used by Carter or Monson), seemingly confirming a high risk of reoffense. PRP, Ex. U. The ISRB relied heavily on Dr. Pereira's report. *See* PRP, Ex. N at 7-8. It continues to do so before this Court. ISRB's Response at 25, 31-34.

Because of the huge discrepancy between the new psychological report and the last two, Dyer retained psychologist Brett Trowbridge to review all three reports and the scoring sheets of the evaluators. Dr. Trowbridge is a former deputy prosecutor, and the former director of Washington's Mentally Ill Offenders Program at Western State Hospital. .100 Memo at 16-17. Dr. Trowbridge was also provided with various objective information about Dyer's case, primarily from court records. .100 Memo, Ex. 19(A) at 2.

As Dr. Trowbridge explained in a report presented to the ISRB, Dr. Pereira's scoring of the Static-99 – which is based solely on verifiable, objective criteria – is indisputably wrong by a wide margin. Similarly, Dr. Pereira's scoring on the PCL-R is baffling. As Dr. Trowbridge explained, the scores on many of the factors cannot be reconciled with the verified facts concerning Mr. Dyer. .100 Memo, Ex. 19(A) at 3-4. "In my view the high scores she assigns on these factors suggest she is either not well-versed in how the instrument is supposed to be scored, or that she is not familiar with Mr. Dyer's history and background." *Id.*[8]

Undersigned counsel presented the ISRB with a detailed explanation of Dr. Pereira's erroneous scoring, including a copy of the scoring manual. This analysis is set out nearly verbatim at pages 29-34 of Dyer's PRP, with citations to the appropriate exhibits. The Court can readily see that many of the factors cannot possibly apply to Dyer in view of the indisputable facts concerning his background and history.

Undersigned counsel and Mr. Dyer also explained to the ISRB how Dr. Pereira misunderstood much of what Dyer said in his one, brief interview with her, and refused to review materials proffered by Dyer to confirm his account. *See* PRP at 33-34. The tone of her report suggests

[8] Dyer's motion to expand the record with a full report from Dr. Trowbridge is pending.

that she viewed Dyer's account as a tall tale, when in fact his many accomplishments can be readily verified.

The ISRB's position appears to be that it may rely on a psychological report even if it is unquestionably based on a mistaken understanding of objective facts concerning the subject. This Court should not accept such a Kafkaesque view of our parole system. Rather, it should find that Dr. Pereira's report is not the sort of reliable, objective evidence on which the ISRB may base a decision. *Cf. McQuillion*, 306 F.3d at 909-10 ("some evidence" did not support decision to rescind parole date based in part on psychological report written by doctor who never met and examined prisoner); *Lawrence*, 44 Cal.4th at 1223-24 (reliance on "stale" psychological evaluations did not provide some evidence of current dangerousness).[9]

3. The ISRB Cannot Rely on the Unchangeable Circumstances of the Crime of Conviction

All members of this Court have consistently found it inappropriate to deny parole based on the unchangeable circumstances of the crime of conviction. As the Court explained in *Dyer I*,

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[9] Likewise, the ISRB cannot reasonably rely on decades-old psychological reports concerning Dyer. As this court noted in *Dyer I*, Mr. Dyer has a clear history of improvement during his time in DOC, apparently coinciding with the many programs he has taken. *Dyer I*, 157 Wn.2d at 366-67.

> [T]he ISRB focused substantially on the unchangeable circumstances of Dyer's crimes, which occurred in 1980. . . The ISRB's reliance on the nature of Dyer's crimes and disregard of evidence of Dyer's rehabilitation conflicts with its statutory responsibility to consider the evidence presented in determining whether a prisoner has established he is rehabilitated.

Dyer I, 157 Wn.2d at 368. The ISRB should not rely once again on "the same facts that justified the imposition of Dyer's original exceptional sentence." *Id.* at 365. *See also, Dyer II,* 164 Wn.2d at 291 ("In *Dyer I*, the ISRB erroneously relied upon the nature of Dyer's crimes to assess his recidivism risk.")

Similarly, the California Supreme Court has held that the "circumstances of the commitment offense" may be considered only to the extent they "continue to be predictive of current dangerousness many years after commission of the offense." *Lawrence*, 44 Cal.4th at 1254. Here, three reputable psychological evaluations have found that Dyer's 30-year-old commitment offense is no longer predictive of dangerousness.

B. THE ISRB'S DECISION IS NOT REASONABLY CONSISTENT WITH THE SRA

Prior to 1984, the ISRB was generally free to set minimum terms as it saw fit (with the exception of certain crimes), and was likewise free to hold a prisoner until his maximum term expired. In fact, RCW 9.95.100

permitted the ISRB to parole a prisoner only if "in its opinion his or her rehabilitation has been complete and he or she is a fit subject of release."

The Sentencing Reform Act (SRA) "changed the criminal sentencing system in Washington from an indeterminate system to a determinate system effective July 1, 1984." *In re Pers. Restraint of Whitesel*, 111 Wn.2d 621, 626, 763 P.2d 199 (1988). The SRA's determinate sentencing ranges directly apply only to crimes committed on or after July 1, 1984. *Id.* at 626. However, RCW 9.95.009(2) requires the ISRB "to consider the purposes, standards and sentencing ranges set forth in the SRA and to attempt to make its decisions regarding pre-SRA offenders *reasonably consistent* with SRA ranges and standards." *Id.* at 626 (emphasis in original).[10]

"The Legislature clearly enacted RCW 9.95.009(2) to remedy a statutory scheme that otherwise would create gross disparity between sentences set under the indeterminate sentencing scheme and sentences set under the SRA's determinate scheme." *In re Pers. Restraint of Myers,* 105 Wn.2d 257, 267, 714 P.2d 303 (1986). RCW 9.95.009(2) expressly applies not only to the initial setting of the minimum term, but also to

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[10] The statute also requires the ISRB to consider the sentencing recommendations of the judge and prosecutor. As Dyer has pointed out, the only recommendations in this case are invalid because they were made before three of Dyer's original five convictions were overturned. *See* PRP at 25.

"parole release under RCW 9.95.100." The ISRB "shall give adequate written reasons whenever a minimum term or parole release decision is made which is outside the sentencing ranges under [the SRA.]" RCW 9.95.009(2).

In *In re Pers. Restraint of Locklear*, 118 Wn.2d 409, 823 P.2d 1078 (1992), this Court held that "[t]he ISRB's procedures for and factors relevant to setting a new minimum term must be substantially similar to the SRA exceptional sentence procedures and factors." *Id.* at 416.[11] Thus, in *Locklear*, the Court harmonized sections .009(2) and .100. The ISRB's previously unbridled discretion to deny parole and thereby increase the minimum term was now restricted to the extent the new minimum term would be inconsistent with the standard range under the SRA. Under those circumstances, the ISRB could increase the term only by finding "substantial and compelling reasons." *See* RCW 9.94A.535. This is consistent with general principles of statutory construction. *See State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001), *cert. denied*, 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002) (statutory provisions should be construed harmoniously whenever possible).

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[11] *Locklear* involved the setting of a new minimum following revocation of parole. There is no reason to provide lesser protections when the ISRB increases the minimum term for a prisoner, like Dyer, who has not violated parole conditions.

In *In re Pers. Restraint of Addleman*, 151 Wn.2d 769, 775, 92 P.3d 221 (2004), however, a five-Justice majority stated that RCW 9.95.100 could "trump" RCW 9.95.009(2). The dissent complained that this language appeared to write section .009(2) "out of existence." *Id.* at 779 (Johnson, J.). The dissent would have granted Addleman's petition because the ISRB's latest decision increased his minimum term to "three or four times the high end of the sentencing range." *Id.* at 782. Two years later in *Dyer I*, a majority of the Court relied in part on inconsistency with SRA standards to find that the ISRB abused its discretion in denying parole. 157 Wn.2d at 359. "[T]he dissent's emphasis on the facts of Dyer's crimes disregards the legislature's mandate that an offender's confinement under the indeterminate system and the SRA remain reasonably consistent." *Id.* at 360 n.2.

The most reasonable interpretation of these cases is that the Court has never overruled *Locklear*. The majority's result in *Addleman* can best be understood as a finding that substantial and compelling circumstances were present in that case. *See Addleman*, 151 Wn.2d at 777-78 (discussing the "ample evidence" of lack of rehabilitation).

Dyer's case is quite different. By the ISRB's own calculations, the high end of Mr. Dyer's standard range is 88 months. PRP, Ex. N at 2. He

is currently serving a 560-month minimum term, over *six times* the SRA range. To put this in perspective, had Dyer been sentenced on two counts of first-degree murder in 1986 (when the ISRB set his minimum term under SRA standards), his range would have been only 271-361 months. RCW 9.94A.310, .360(10), .400 (1986).[12] The ISRB fully took into account what it viewed as the aggravated nature of the crimes themselves when it initially set an exceptional minimum term of 240 months. Now, the ISRB is relying on its questionable position that a prisoner must not be rehabilitated if he has not completed a particular treatment program. Because there are no "substantial and compelling" reasons for Dyer's excessive sentence, he must be paroled. [13]

Of course, if it believes Dyer to be dangerous, the State has the option of filing for civil commitment. *See Addleman*, 151 Wn.2d at 782 n.6 (dissent of J. Johnson).[14] In fact, in its latest Decision and Reasons,

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[12] "Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life." *Coker v. Georgia*, 433 U.S. 584, 598, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

[13] The ISRB's own factors provide a ready framework for a finding of aggravating circumstances. For example, serious "continuing . . . criminal conduct while incarcerated" could certainly meet that standard. *See* WAC 381-60-160 (factor 3).

[14] "If the ISRB is concerned about Addleman's lack of rehabilitation and his risk of reoffending, it should not extend his minimum sentence in order to keep from releasing him. As discussed above, the extension would not be consistent with the SRA. Instead, the State could proceed against Addleman under the civil commitment statute as a sexually violent predator. *See* ch. 71.09 RCW." *Id.*

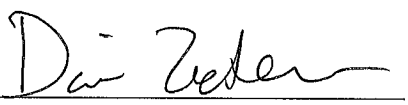
the ISRB requested a "forensic psychological evaluation" to determine whether Dyer meets the criteria for civil commitment. PRP, Ex. N at 9.

IV. CONCLUSION

The ISRB's position is that it must hold Dyer in prison forever because he denies guilt and therefore is not permitted to engage in the ISRB's treatment program of choice. This Court should conclude that such reasoning is an abuse of discretion in Dyer's case, in part because it is inconsistent with the SRA. Because any increase in Dyer's minimum term is incompatible with SRA standards, the Court should order the ISRB to set conditions of parole immediately.

DATED this 21st day of November, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of this brief on the following:

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